Exhibit 8

State of California ex rel. Ven-A-Care of the Florida Keys, Inc. v. Abbott Labs, Inc. et al., Civil Action No. 03-11226-PBS

Exhibit to the November 25, 2009 Declaration of Philip D. Robben in Support of Defendants' Joint Motion for Partial Summary Judgment

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

In re: PHARMACEUTICAL INDUSTRY AVERAGE WHOLESALE PRICE LITIGATION	
United States of America ex rel. Ven-A-Care of the Florida Keys, Inc. v. Abbott Laboratories, Inc., Civil Action No. 06-11337-PBS; and United States of America ex rel. Ven-A-Care of the Florida Keys, Inc., v. Dey, Inc., et al., Civil Action No. 05-11084-PBS; and United States of America ex rel. Ven-A-Care of the Florida Keys, Inc., v. Boehringer Ingelheim Corp., et al., Civil Action No. 07-10248-PBS	MDL No. 1456 Civil Action No. 01-12257-PBS Honorable Patti B. Saris

second column --

A. Okay.

Q. -- about three-quarters of the way down. Actually, it's in the third column. I'm sorry. Do you see where that second definition says "estimated acquisition costs"?

A. Yes, ma'am.

Q. Are you familiar with that definition?

A. Yes, ma'am.

Q. Has the State tried to determine estimated acquisition costs in accordance with that definition?

A. To our best estimate, yes, we do.

MS. OBEREMBT: I'd like to mark as Exhibit 3 a chart that tries to summarize Arkansas' reimbursement formulas and dispensing fees since 1990.

[Marked Exhibit Bridges 003]

A. Thank you.

Q. (By Ms. Oberembt) Would you take a second to look over that chart, please? Is this chart familiar to you?

the chart.

MS. OBEREMBT: I'm going to ask the court reporter to mark this as Exhibit 4. And it's a document entitled "Official Notice of the Arkansas Department of Human Services" dated July 6, 1990.

[Marked Exhibit Bridges 004]

Q. (By Ms. Oberembt) Does this appear to be a document issued by DHS?

A. Yes, ma'am.

Q. And does the reimbursement formula set forth in Exhibit 4 correspond to the first entry on the reimbursement chart marked as Exhibit 3?

A. August 1st of '90, yes, ma'am.

Q. And -- and what is the reimbursement formula for the time period August 1, 1990 through June 30th, 1991?

A. It's brand and generic AWP minus 10 and a half percent, plus the 4.16 plus the .093 times the EAC. It's a sliding dispensing fee back then.

Q. And that formula is reflected on

remember that we specifically had a Myers & Stauffer survey at this time. I don't recall that, if we did.

Q. And what was the goal here of the State in making this change to the reimbursement formula?

A. Well, in essence, we felt and Mr. Hanley, from what I recall, felt fairly certain that the chain reimbursement -- that the chains could purchase at a much better price than the independents, and so the purpose was to get up closer to the actual -- what that pharmacy was actually paying for the drug for a chain. So that was his intent.

Q. And then I notice here that the -- this reimbursement formula was only in effect for approximately nine days?

A. Uh-huh.

Q. Nine or ten days. What happened?

A. A lot was going on at that time. So what I can recall is CMS approved it. I have to assume that the legislature approved it. We

implemented it, and then we knew that Wal-Mart and Walgreens were going to file a lawsuit. So I don't know if there was an agreement to just pull it back, but we -- we terminated it at that point in time. But I just -- I don't know every little piece that transpired to -- to cause us to pull it, but due to upcoming litigation, we withdrew.

Q. And -- and did -- did Wal-Mart and Walgreens actually sue the State over this?

A. That's correct. Now -- I don't know that they sued. They filed litigation. I don't know. I don't know how to answer that. I don't know if it was law -- it was a lawsuit.

Q. All right. And do you know what the end result of the litigation was?

A. Well, we were not allowed to pursue the AWP minus 17 percent on chains. I -- yes, they did file a lawsuit. I guess my thought of lawsuit, I was thinking of financial lawsuit, but yes, they pursued a lawsuit, and we lost. Sorry about that.

MS. OBEREMBT: I think this is a good

Multiple Source Drugs"? Is that what you understand to be the federal upper limit?

A. Yes, ma'am.

Q. And what is the "federal upper limit"?

A. The federal upper limit is a maximum allowable cost that's applied to generically equivalent brands and generics.

Q. Does the State set that amount?

A. Not on the federal upper limits, no.

Q. Who sets the federal upper limits?

A. CMS.

Q. We've looked at the State of Arkansas' reimbursement formula since 1990. Does -- has the state consistently defined EAC with reference to AWP?

A. Yes.

Q. Have you seen the State define AWP as anything other than the -- the plain meaning of the words, average wholesale price?

A. No, ma'am.

Q. What was the State's -- what is the State's goal in using AWPs for reimbursement

amount per unit that we'll reimburse for -- for a drug.

Q. Can you tell me just generally how the State sets a MAC?

A. Generally when a -- generic equivalents become available for a brand and we are made aware of that, we'll -- we'll review the generic products that are out there and try to obtain from pharmacies what they say that they pay for that product and then go from there to set the MAC.

Q. As part of the MAC process, does Arkansas compared -- compare the EAC of a drug that might be MAC'd with the proposed MAC?

A. We will -- I -- we look at that, yes. We'll look at what the brand EAC is versus the -- the different generic prices.

Q. And what if when you do that comparison, what if the brand EAC is lower than the proposed MAC? What do you do then?

A. There wouldn't be a reason to set the MAC.

that -- that "My dispensing fee is too low, and so you need to make it up for me on the ingredient cost"?

A. Oh, no. I mean, no. They wouldn't have said -- no. Our -- our dispensing fee has generally been claimed to be some -- at one time we were higher than most of the other states on our dispensing fee, so we've never really had pharmacists complain about our dispensing fee.

Q. On the chart that's Exhibit 3, there's a reflection that beginning in March of 2002, an additional differential dispensing fee of $2 shall be given to pharmacy providers when a generic that does not have a State or Federal upper limit is dispensed, and I'm reading from Footnote 8 on Exhibit 3, if you want to pull that out. What was the purpose of -- of that change to the reimbursement formula?

A. We had some generics that didn't have upper limits on them, and so as an incentive for the pharmacist to -- to dispense those, rather than trying to dispense a

therapeutically-equivalent brand, we -- that was an incentive for the pharmacist to dispense the therapeutically-equivalent generic.

Q. Say in fast ten times.

A. No, thank you. No, thank you.

Q. Is it -- is it your understanding that the State is supposed to make its dispensing fee determination separate from its determination of ingredient cost?

A. We've always considered them a separate entity, separate -- two separate things.

Q. Has Arkansas ever had any practice or policy of paying increasing ingredient costs to make up for inadequate dispensing fees?

A. No.

Q. Does the State itself operate the MAC Program?

A. We do, yes, our state MAC Program.

Q. And does the State have any assistance from an outside contractor on that?

A. We have a -- an individual that works strictly for us through an outside contract, yes.

A. Speculating any price could be put into that billed amount by a pharmacy or a pharmacist, but that's a speculation.

Q. Let me clarify my question. The -- the regulations in place for Arkansas Medicaid Program required a pharmacy to submit their billed amount, the usual and customary charge; is that correct?

A. That's correct.

Q. And if Arkansas Medicaid wanted to know what the actual acquisition cost was for each drug reimbursed under the Medicaid Program, it could have asked pharmacies to submit that information on each claim form, correct?

MS. MOSLEY-SIMS: Objection, form.

MS. OBEREMBT: Objection.

A. I -- I -- could they have asked? Speculating, they could have asked. Would it have been feasible or even physically possible to -- to review the acquisition cost for each NDC, that would be -- that would be absurd, and it would defeat the purpose. I mean --

provided more than just the cost of the drug?

MS. OBEREMBT: Objection.

A. I'd have to see a document. I'm not familiar with any document. If you have a document, I'd be happy to look at it. Do you have something you can provide me to look at, so I can answer you better?

Q. (By Mr. Reale) Now, are there any factors in Arkansas that make --

A. You didn't answer me.

Q. We'll look at documents later, but --

A. Okay.

Q. -- for now, I just want to ask the questions. Are there any factors in Arkansas that make access a particular concern? In other words, are there rural areas that you have to focus on when you set your payment level that may have difficulty for Medicaid patients getting access?

A. I think that's always a consideration, is that you be aware of areas where there may not be pharmacies in -- in all of the -- you know,

multiple pharmacies in a -- in a place.

Q. And when Arkansas Medicaid sets its payment rate for drug cost, it doesn't set a rate based on what one pharmacy acquires their drugs at?

A. No, that's exactly correct. We -- that's why we have to go on our best estimate, so that when we reimburse -- we don't reimburse separate -- different pharmacies different rates. The reimbursement rate is -- is applied to all pharmacies. We don't choose this pharmacy over here and set a rate because they might be in this area, and another pharmacy because they're in that area. We don't do that.

Q. And -- and --

A. Is that what you're asking?

Q. Yes. And Arkansas Medicaid is also aware that some pharmacies acquire their drugs at different costs than other pharmacies?

A. That's what we are -- based on the Myers & Stauffer survey from 2000 -- or 2000 -- I don't remember the last survey, but it showed the

manufacturers?

MS. MOSLEY-SIMS: Objection.

A. I can only go by what this states.

Q. (By Mr. Reale) Right. And the rate doesn't reflect what the average acquisition cost was for pharmacies --

A. Again, if we're going back to the access issues, this is -- again, you're talking about a set number of pharmacies. Not every pharmacy can purchase at the same price, so you've got to make sure you maintain access, so you've got to set an ingredient reimbursement that will allow access to all the Medicaid recipients of the entire state.

Q. Right.

A. So not every pharmacy can purchase at the same rate as another pharmacy.

Q. And --

A. So again, the State, I would have to think in consideration of that.

Q. That's -- and so that's right. And so the Medicaid Program has to be mindful not just

trying our best to reimburse closer to the acquisition cost on a generic drug.

Q. (By Mr. Reale) How long has Arkansas' Medicaid MAC Program been in place, the State Upper Limit Program?

A. When I came onboard, there were State MACs in place at that point in time.

Q. And you testified that the MAC prices -- sorry. You state -- you testified earlier that the MAC prices set by Arkansas' Medicaid Program were based on actual acquisition cost to pharmacies?

A. I never said that.

Q. Well, how is the MAC Program set up?

A. Again, the -- the MAC Program, we -- we have an individual that currently does that for us today. Basically, he will -- when we are aware that there are some generics that have become available for a brand, generic equivalents, he will obtain -- he'll -- he'll find out from different pharmacies. He'll call pharmacies who -- who are willing to work with us, give us their

invoice price, what they pay for the drug.

We don't -- their invoice price. He'll also get from them the different prices that they pay for their generics and just kind of -- through some type of an analysis -- I don't know the full detail of how he does it, but we'll determine a MAC on -- on that generic -- on the generic, on the GCN. Are you familiar with the GCN?

Q. Yes. But why don't, for the record, you say what that is?

A. The GCN is a single number that will encompass multiple NDCs, so that rather than having to apply something to each specific NDC, it represents that specific drug, its dosage form, its route of administration, so that you don't have to be with a lot of numbers.

Q. So is -- is it fair to say that a MAC price that's set for a generic drug is not based on AWP?

A. It's not -- it doesn't reimburse off of AWP. We might look at what the acquisition cost

of that brand is.

Q. Okay.

A. Okay. We -- like if -- if you have a -- the easiest way for me to explain it, if you have a brand and you know that -- what we would reimburse based on our reimbursement formula, AWP minus 14 percent, then you -- he also finds out from the pharmacy what that actual cost of that brand is just as a comparison tool, so that when he is setting the MAC, he can make that -- make a comparable determination.

Q. Is -- is the MAC based in part on the invoice price of generic drugs within the GCN?

A. The MAC looks at what the pharmacies tell us are the invoice price for the different NDCs within that GCN. So he has a -- he'll determine -- he'll put them -- I'm not good at explaining how he does it. He puts them all on a spreadsheet. He develops a spreadsheet of all of the NDCs that he can obtain within that GCN and gets the invoice prices from the -- from the pharmacies.

saying we don't have a physical invoice to look at. We're calling them and we're -- we're putting our trust in them that they're giving us an honest number of what they pay for the drug.

Q. (By Mr. Reale) And -- and the MAC price is below the AWP, correct?

A. Yes.

Q. And it's actually below the estimated acquisition cost, correct?

A. Yeah. That's correct.

Q. So the MAC price is not based on AWP?

A. That's correct.

Q. It's based on actual invoices that --

A. It's based on what pharmacies say they have paid for the prescription.

Q. How many drugs are subject to the MAC?

A. I don't know. I don't know.

Q. More than 1,000?

A. That's a -- when you say actual drugs or GCNs, there's a big difference.

Q. Well --

A. And so I don't know how to answer that

question. There would have been --

Q. How many GCNs are subject to the State MAC?

A. I honestly -- I honestly do not know. I'd have to pull the upper limit list online and look to see which ones are Federal upper limits and which ones are State. I don't know.

Q. Do you believe it's more than 500 that are subject to a State MAC?

A. I don't know. I mean, there are -- there are several, but I honestly cannot tell you how many. I've never just gone in to look to count. That's -- that's not part of what I do. That's not --

Q. And I believe you testified it's an individual EDS that actually surveys the pharmacies to determine their acquisition --

A. He's contracted to do that for us. That's just one of his job duties. He has several other job duties, but that's one of his.

Q. But one of his job duties is dedicated solely to determining a MAC price?

A. One of his job duties is to assist us with the MAC pricing.

Q. Okay. We can take a break now.

VIDEOGRAPHER: Going off record at 3:11 p.m., ending Tape 5.

(Whereupon, a break was taken.)

VIDEOGRAPHER: Back on the record at 3:23 p.m.

Q. (By Mr. Reale) Hello again. Before our break, we were talking about Arkansas' State MAC Program, and you testified that the State MAC prices that were set for generic drugs were not based on AWP; is that correct?

A. That's correct.

Q. And the State MAC prices that were set were lower than the estimated acquisition cost as that is defined by Arkansas Medicaid?

A. That's correct.

Q. And they're based, the MAC prices, on actual invoice prices of drugs in Arkansas?

A. Well, again, they're based on what the pharmacy says they have paid for the product.

Q. And you have no reason to doubt that pharmacies are submitting you accurate and truthful information?

A. I have no reason to doubt.

Q. Now, when we looked at the 1997 report, which we marked as Roxane Exhibit 12, and in particular, the finding that pharmacies, on average, paid 42.5 percent less than AWP for drugs sold to Medicaid beneficiaries, you referenced the State's MAC Program in the context that -- of our discussion. Do you recall that?

A. Yes.

Q. Is it your testimony that the State's MAC Program achieved savings of 42.5 percent less than AWP on most drugs?

A. I really can't answer that. I don't -- I can't be definite on that.

Q. Why wouldn't Arkansas' Medicaid Program adopt a definition of estimated acquisition cost for generic drugs of AWP minus 40 percent?

A. If we knew that the AWPs that were being provided to us were accurate, then we could

products. And they're telling you, Arkansas Medicaid, that on average, drugs with FUL prices are being acquired at discounts off of AWP of 82 percent. And for drugs without FUL prices, they're being acquired, on average, of discounts approximating 46 percent. And pharmacies are not submitting you any evidence to challenge these findings, and you're selecting AWP minus 20 percent. Why is that?

MS. FORD: Objection to form.

A. This was not just -- this -- I can't answer that question.

Q. (By Mr. Reale) Do you think that it was driven more out of a political compromise that Arkansas selected AWP minus 20 percent than it was a belief that drugs were actually acquired at rates less than AWP minus 50 percent?

MS. MOSLEY-SIMS: Objection.

MS. FORD: Objection, form.

A. I believe it was a provider relations issue more than -- it was not necessarily a political issue, but a provider relations issue,

that we wanted to make sure that we could -- again, that we wanted to make sure that all of the Medicaid recipients in the State would be able to obtain drugs. So we didn't want to take a chance of, or risk them losing access.

Q. (By Mr. Reale) But -- but doing so, by choosing AWP minus 20 percent out of an access concern, you realized that you were paying, on average, more than the estimated acquisition cost for many pharmacies and many products?

MS. MOSLEY-SIMS: Objection, asked and answered. Can we move on?

A. And again, I will respond to that, that we're not taking into consideration -- we're focusing strictly on reimbursement off of AWP. We're not -- there's no focus on what we have State MACs on either. So -- and this is only referring to FULs. So to me that's -- that's making an assumption that we didn't take action and that we assumed something by that.

Q. (By Mr. Reale) But you certainly knew that AWP didn't represent anything close to the